

January 22. 1735.

MEMORIAL for George Moncrief of
Reidie, Esquire,

Against Mr. Patrick Maxton, pretended
Minister of Auchtermuchty,

IN the Question betwixt the Parties, touching Mr. Maxton's Right to the Stipend, and other Benefice of the Parish of Auchtermuchty, and Mr. Moncrief's Right to retain the Benefice in his own Hands, in respect of the Presbytery's having refused to admit Mr. Matthew Moncrief, a qualified Minister presented by the Patron; or rather, in respect of the Church's having reversed his Settlement, after he was duly admitted by a proper Judicature, the Debate before the Lord Ordinary turned chiefly upon the Power of the Church; that their Sentences were final with respect to the Admission of Ministers, and that they had an exclusive Jurisdiction in those Matters; that if the Church refused to admit a Presentee, the Patron had no Redress in the Civil Courts: It was for that Reason, that Mr. Moncrief in his Information, did chiefly insist upon the Point of Jurisdiction, as being the main Point in Issue betwixt the Parties: But the Procurators for Mr. Maxton, having in their Information waved the Point of Jurisdiction, and having insisted upon several Objections to the Form of the Presentation, that had not been mentioned in the Debate, nor by the Church, and appeared newly to be taken up by Mr. Maxton's Procurators, this Memorial is humbly offered, in order to remove those Objections.

And in the *first* Place, Mr. Moncrief will be allowed to assume in the present Argument, that the Right of Patronage was undoubtedly *quoad* the Fee, in my Lady Newark, and
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the Liferent in Sir *Alexander Anstruther* her Husband ; and that the Patronage, with all the Consequences thereof, are duly conveyed in their Favours. The Rights are produced in Court, and no Exception is taken to them. And 2^{dly}, He will assume, that the Patron has by Law a Right to retain the Fruits of the Benefice, in Case the Presbytery refuse to admit a qualified Person presented by him, and that he is intitled to claim this Right from this Court, he humbly hopes he has made out this Point in the Information offered in his Behalf.

3^{dly}, That Mr. *Matthew Moncrief* the Presentee, is a qualified Person, in regard he was regularly tried and admitted by the Church, and that hitherto no Exception has been made to his Qualifications.

And 4^{to}, As a Consequence of those Propositions, he hopes he will be allowed to assume, That he is well founded in his Right of Retention of the Benefice, unless Mr. *Maxton* can show, that the Patron has forfeited his Right, by some Fact or Omission upon which the Law has imposed such a Forfeiture : And he hopes he will be forgiven to consider the Objections offered in Behalf of Mr. *Maxton* in this View.

And taking the Matter in this Light, Mr. *Moncrief* is advised, that the only Ground of Forfeiture of the Patron's Right of Presenting, is, if he neglect to present a qualified Person within six Months of the Vacancy, that upon such Neglect the Right devolves upon the Presbytery, and that for a solid good Reason, that the Parish be not kept vacant through the Patron's Default : But if the Patron is guilty of no Neglect in this Matter, if he presents a qualified Person within the six Months, though the Church should delay his Admission for six times six Months, they neither can deprive him of his Right, nor take the Benefit of a Delay which they have occasioned, or plead a *jus devolutum* in themselves by the lapse of Time : Now, as Mr. *Moncrief* subsumes, That the Patron in the present Case did present a qualified Person within the six Months, therefore there was no Forfeiture, nor no *jus devolutum* to the Presbytery ; and that the Objections now
made

made in Behalf of Mr. *Maxton*, are not sufficient to infer a Forfeiture.

And as to the first Objection, namely, That the Patron did not produce his Right to the Patronage within the six Months, and that therefore he forfeited his Right, it is answered, That no Law has limited a Time for the Production of the Patron's Right, under the Forfeiture of his Right of Presentation; and therefore, this were to impose a Forfeiture without Law, and with Submission, without any good Reason, as shall be shown by and by.

For it will be considered, that the Patron has six Months to offer his Presentation, and as the Church is presumed to know the Patrons within their Bounds, no Law has required, nor indeed insinuate, that the Patron is along with his Presentation, to give in a Progress to the Right of Patronage; and it is believed, that no such Thing was ever practised, either in this Church, or in any other Church whatsoever.

At the same time, Mr. *Moncrief* has no Occasion to controvert, but that if upon a Presentation offered within the six Months, the Presbytery have any Reason to doubt of the Patron's Right, they may call upon him to produce his Right, and he will also admit in the present Argument, that the Church has a Power in the first Instance, to judge of the Patron's Right: But then he apprehends, it must at the same time be admitted to him, that neither by any Law, nor by the Nature of the Thing, is it necessary that this Production of the Patron's Right, should be within the six Months: He has the six Months to present, and it is only upon an Objection made in behalf of the Presbytery, that he ought to produce: And therefore, by the Nature of the Thing, the Production must be after the six Months. And 2^{dly}, upon the same Grounds he apprehends, that if the Presbytery object to the Patron's Right, that he ought to have a fair Trial, that is, that it ought to be notified to him they are to try his Right of Patronage, and a Time ought to be assigned him for producing his Right, before they can conclude him and forfeit him

for not Production. This he is advised is a necessary Consequence of what has been already said. The Law has fix'd no Time for the Patron's Production of his Right, nor imposed no Forfeiture by any Lapse of Time; and therefore, if the Presbytery are to forfeit him for his Delay, they are to interpell him, to give him a competent Time to produce his Right, and they can only forfeit him upon his Neglect, after the Lapse of that Time.

Now, if the Presbytery's Procedure is examined by this Rule, it must be apparent that the Patron has incurred no Forfeiture; for the only Interpellation made to the Patron, the only Doubt moved against his Right by them, is by their Minute of the 22d of *May* 1733, which is in thir Terms: " The
 " Presbytery agreed, that it should be proposed to Captain
 " *Moncrief* of *Reidie*, that if the Lady *Newark* or he had
 " any Documents of their being undoubted Patrons of the Pa-
 " rish of *Auchtermuchty*, it would be needful that they lay the
 " same before the Presbytery. Captain *Moncrief* being cal-
 " led in, the above Minute was read to him: To which he
 " answered, That the Lady *Newark* and he had very good
 " Documents to shew of the Right of Patronage to the Parish
 " of *Auchtermuchty*; but that he never thought the Reve-
 " rend Presbytery a Judicature competent to demand such
 " Rights; or, that they were a Judicature proper to judge of
 " such Rights, though produced." And upon this Answer
Reidie is removed, without any the least Insinuation that the
 Presbytery insisted in their Demand, or that they were not sa-
 tisfied with the Answer made, That my Lady *Newark* had a
 sufficient Right, and that there was no Occasion to produce it
 to the Presbytery: Nor is there after that any new Demand
 made by the Presbytery of the Production of the Right of Pa-
 tronage, nor any Insinuation that the Presbytery was dissatis-
 fied with the Patron's Right, until at their Meeting of the 24th
 of *July* 1733, the Presbytery having first forfeited the Patron
 of his Right, by a Vote, sustaining the Call to Mr. *Maxton*;
 then, as one of the Reasons of their Sentence, they add,
 " That

“ That although Captain *Moncrief* and my Lady *Newark*
 “ their Right was called in question, and he thereupon requi-
 “ red to produce Documents thereof, yet he has always de-
 “ clined to do it.” So that he was forfeited of his Right, for
 not Production, before he had any Ground to suspect that the
 Presbytery did desire the Production of his Right. This he
 humbly submits, if it can be supported by any just Rules of
 Procedure; and if he ought not to have been reponed against
 such Forfeiture; or if the Presbytery could take any Benefit,
 or plead a *jus devolutum* upon such a Practice.

Add to all this, that an unquestionable Right to the Patronage was produced to the Church, *rebus integris*, that is, before the Vacancy was supplied; the Right of Patronage that is now produced before the Court, and is admitted to be unquestionable, was produced before the Commission of the General Assembly, and by them sustained.

And on this head Mr. *Moncrief* will be forgiven to observe, That it is absurd to say, that the Commission was but a Court of Appeal, and therefore could not receive in the Right of Patronage, which had not been produced before the inferior Court; for it was one of the Grounds of Complaint he had against the inferior Court, that they had forfeited him of his Right for not Production, when he had no Reason to apprehend that it was desired by the Presbytery; and therefore the single Production of the Right was sufficient to repon him against the Forfeiture. It is the same Case, as if in an inferior Civil Court a Decreet of Circumduction should go against one, for not producing a Right, when no Day had been assigned him for such Production. Is it pleadable that, in the Superior Court, where the Matter was brought by Appeal, he could not be reponed against the Circumduction, nor be allowed to produce his Rights, because it was a Court of Appeal? It is, with Submission, to assert neither more nor less, that such a Decreet of Circumduction, however erroneously pronounced, is irreversible.

And as Mr. *Moncrief* apprehends his Objection to the Forfeiture

feiture of his Right is founded upon the common Principles of Justice, so he is informed, that the Practice is of his Side ; That where there was no competing Patron, no Instance can be assigned where the Patron's Right was produced along with the Presentation ; or where it was judged necessary to produce it within the six Months ; or indeed any Instance where a Patron was forfeited for not producing his Right : And that for an obvious Reason, That the Church has no Right to present to any Benefice ; their Right is founded singly upon the Necessity of the Thing, that the Church should not continue vacant : And therefore, if a Patron present within the six Months, and no other claim Right to the Patronage, or oppose the Presentation, the Foundation of the Presbytery's Right ceases ; the Presbytery has no Interest to oppose the Settlement of the Presentee, or to claim a *jus devolutum*, where there can be no Prejudice to the Church ; where the Settlement may be as speedy upon the Presentation as upon their *jus devolutum*.

And what Mr. Moncrief now pleads, he is informed is the established Practice in the other Part of the Nation : In *England*, if the Bishop should refuse a Presentee where there are no competing Patrons, he behoved to direct a Commission for trying the Patron's Right, and where the Patron would have proper Opportunities to maintain his Right ; and if, without the Bishop, he should proceed to settle another, there would ly an Action at Common Law at the Instance of the Patron, for recovering his Right, and for annulling the Settlement : And as the Church's Right in *England*, the *jus devolutum* leans upon the same Principles in this particular, though the Remedy is different ; here the Patron only claims the Retention of the Benefice ; in *England* the Settlement is reversed ; he cannot, with Submission, see but the Determination ought to be the same.

But in the *next* place, As the single Ground of Forfeiture of the Patron's Right, ever mentioned by the Presbytery, was the not Production of his Right ; and as it is admitted that his Right was produced *rebus integris*, before the Church was settled

settled by any other : And indeed upon the Production of his Right and the Presentation, the Presentee was regularly settled by the Church ; Mr. *Moncrief* is in your Lordships Judgment, if this of itself does not supersede all Objections to its not being produced more early. He apprehends, that though the Law had required the Production of his Right within the six Months, which however is not the Case, and that he had omitted to produce it within that Time, yet if he produced his Right before another was collated and admitted by the Presbytery, no Advantage could be taken of his Neglect.

And on this Head he apprehends 'tis a settled Rule in all similar Cases, That a *mora* is purgeable *rebus integris*. Many similar Instances might be adduced ; and he knows no Exception from the Rule. A Tutor of Law has a Year to accept before there can be place for a Dative ; and yet after the Year, the Tutor of Law may serve, and at any Time until the Dative is expedite. A Superior, upon refusing to enter his Vassal, forfeits the Superiority for that Vice, and yet he may save himself against the Forfeiture, by granting a Charter at any Time before Declaration of Tinsel. In the same manner, the next Protestant Heir may take the Benefit of the Succession within two Years after it devolves upon a Papist ; and upon his Neglect for two Years, it devolves upon the subsequent Protestant Heir, who has the like Space to prosecute his Right ; and so on to the remoter Protestant Heirs : But still the first Heir may claim his Right, even after the two Years, until the Succession is actually taken up by a remoter.

And in this Particular Mr. *Moncrief* is informed, That the Practice is uniform in *England*, that though the six Months are elapsed, even though twelve Months are elapsed, if the Presentation is offered before actual Collation by the Bishop or Archbishop, the Presentation is good, and they cannot take the Benefit of *Lapse*. It is laid down as a Principle by *Cook*, 2d *Inst.* p. 273, and by *Wood* in his *Inst.* p. 158. So that in this Particular, there is no Difference betwixt a Forfeiture of a Presentation, and of any other Right.

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And as to the Comparison made betwixt a Freeholder claiming a Vote in an Election, and not producing his Right at the Election, and a Patron not producing his Right along with his Presentation. 'Tis answered, the Cases are by no means similar; a special Statute has directed that every Freeholder, not formerly inrolled, shall produce his Titles under which he claims his Vote, to the Meeting of Electors, in order to his Inrolment, or his being allowed a Vote: And therefore, if he does not give Obedience to the Law, he cannot expect to be inrolled, or to be allowed to vote: But no Law has required the Production of a Patron's Titles along with every Presentation, much less has it limited a particular Day for such Production. And 2^{dly}, In the Case of an Election, the other Freeholders have an original Right in them to make the Election, and they are not bound to take in a Partner, unless he verify his Right. But on the other Hand, the Presbytery have no Right to present a Minister, except upon the Patron's Default, and Neglect to present in due Time; wherefore if he does present within due Time, 'tis *jus tertii* to the Presbytery to object, or to enquire into his Right.

And as to the Instance of Heritors voting in the choice of a Minister upon the Statute 1690, Mr. *Moncrief* is advised it is directly against the Charger; for if Persons should appear as Heritors of a Parish, and should vote without any Objection made by any of the rest of the Electors, neither by any of the Heritors, nor the Elders, but that the Votes of all the Electors were unanimous, Mr. *Moncrief* apprehends it would be absurd in the Presbytery to claim a *jus devolutum*, or to reject such an unanimous Election, upon pretence that the Heritors had not produced their Titles: In such a Case it must have been found *jus tertii* to the Presbytery to object to the Qualifications of the Electors; and with Submission, an unjust Catch in them to plead an Advantage for not production of Titles, when the Parties interested in the Election had made no such Objection, and when, had the Objection been made, it could have been removed without any Difficulty; and

and he is advised the Case is the same with respect to a Patron, where he has no Competitor.

And here Mr. *Moncrief* cannot agree that the Heritors presenting upon the Statute 1690, would have been without a Remedy, if they had been thus used, or rather abused by the Presbytery, he apprehends they would have had a Remedy in a Civil Court; and in this he has the Authority of my Lord *Stairs* in his *Instit.* p. 312, where he expressly asserts, *That a Call in the Terms of the Statute 1690, is directly under the Cognizance of the Civil Authority.*

And as to the next Objection offered now by the Charger's Procurators, and which was never formerly offered, neither in the Church Judicatories, nor in the Debate before the Ordinary, namely, That Sir *Alexander Anstruther* had the Liferent of the Right of Patronage; That the Presentation was offered not in his Name, but in his Lady's; That though his Lady had a general Factory from her Husband, who was out of the Kingdom; yet, *first*, No Factory could give a Right to present, and particularly that this Factory gave no such Power. Mr. *Moncrief* will be forgiven to controvert every one of the above Positions. Where is the Law that makes the Right of presenting personal to the Patron? It is a Civil Right as much as the Patron's Right to his Estate. It may be sold and conveyed as much as his Lands or Teinds belonging to him. It may be exercised by Tutors for Infants, by Commissioners one or more, otherwise we must suppose that Infants or People out of the Kingdom are forfeit of their Right; they can't exercise it by themselves, and according to the Charger's Argument, they can't exercise it by another.

And if a Tutor or any Commissioner has a Power to present, sure it can't be denied to my Lady *Newark*, who by her Factory has not only a Power to uplift Rents, and all Sums of Money due to her Husband, but also a Power to borrow Money, and to mortgage his Estate, and to sell and dispoise his whole Estate at pleasure. This Mr. *Moncrief* is advised, is a stronger and greater Power than is competent to

a Tutor or any ordinary Commissioners; and suppose there is no general Clause, yet the extensive Powers given, must comprehend every inferior and lesser Power. She had a Power to sell and dispoſe the Patronage, can it then be pleaded that ſhe had no Right to exerce it, by preſenting or uplifting the vacant Stipends? At the ſame Rate it might be argued, that though ſhe had a Power to diſpoſe the Eſtate, yet ſhe could not let a Tack, becauſe it is not ſpecially mentioned in her Faculty; Mr. *Moncrief* is adviſed, that the granting the greater Powers over every Eſtate belonging to her Husband, does in the Nature of the thing imply every leſſer Power.

And as to the Objection to the Form of the Preſentation, That it is not granted *qua* Factor, but *qua* Patron. 'Tis answered, That ſince the Power of preſenting was in my Lady *Newark*, it can be no Nullity that her Title was not expreſt in the Preſentation, or though it was erroneouſly expreſt; the Law in ſuch Caſes does not ſo much regard the Form as the Point of Right. If one has a Power to grant, and expreſs his Will in a proper Manner, the Grant muſt have its Effect; Thus if a Tutor or Factor ſhould diſpoſe a Subject that was his own Property, as belonging to his Conſtituent or Pupil, the Property would paſs, though there was a Miſtake in reciting the Diſpoſer's Title. This is laid down as a Principle in the Common Law, and is alſo agreeable to the Law of *Scotland*, if one who is not Proprietor, yet diſpoſes Lands as heritable Proprietor, and grants a Procuratory of Reſignation and Precept of Seiſin, with conſent of the true Proprietor, not under the Quality of Proprietor, but for his Intereſt in the Subject, the Property will be transferred notwithstanding the Miſtake in the Diſpoſer's Titles. And put the caſe that my Lady *Newark* had diſpoſed a part of Sir *Alexander*'s Eſtate as heritable Proprietor, could my Lady, or Sir *Alexander*, or any Mortal have objected to ſuch Conveyance, that my Lady was not Proprietor; and would it not have been a good Answer, That my Lady had ſufficient Powers from the Proprietor to grant the Diſpoſition? and if this Objection would

would not have been good in a Conveyance of the Right of Patronage, *à fortiori* it is insufficient against a Presentation.

And as to the Suggestion on this Head, That at the Date of the Factory, the Right of Patronage neither was in my Lady nor Sir *Alexander*, and therefore could not be carried by the Factory; Mr. *Moncrief* might deny the Consequence; the Extensiveness of the Factory, he apprehends, would comprehend Sir *Alexander's* future Acquisitions. But 'tis unnecessary to argue this Point, seeing in fact my Lord *Lindores* was dead fourteen Months before the Date of the Factory; and thereby the Right of Patronage was in my Lady and Sir *Alexander*, and the Power of disposing of the Patronage, or exercising it long before the Factory.

The next Objection, to wit, That my Lady *Newark* had not qualified, by taking the Oaths prescribed by Law, is, with Submission sufficiently answered in Mr. *Moncrief's* Information; No Law has required that Tutors, Commissioners, or others exercising the Right of Patronage should qualify; 'tis sufficient if the Patron himself takes the Oaths prescribed by Law; and in the present Case, Sir *Alexander Anstruther* who had the Right of Patronage in him, was duly qualified; and had the Objection been moved by the Presbytery, a proper Certificate had been produced; but as no such Objection was made, it cannot now be taken up to support their illegal Procedure.

And as to the *fourth* and last Objection, namely, That Mr. *Moncrief* the Presentee had not qualified himself, by taking the Oaths in the Terms of the Statute of the 5th of K. *George I.* that therefore he was incapable to receive a Presentation. And *2dly*, That upon the same Account the Presentation given to him is void, and does not stop the falling of the *jus devolutum*.

It is answered, *1st*, That this Objection is now taken up; and as it was never made in the Church Courts, it cannot therefore justify their forfeiting the Patron of his Right. But *2do*, The Objection is without Foundation in Fact; for Mr. *Mat-*
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thew Moncrief was duly qualified, by taking the Oaths in the Court of Session, before he was presented by the Patron; so that there lay no Objection to the Presentation on that Account; and in the same manner he had taken the Oaths more than one Year before he was admitted in consequence of the Presentation; and therefore he was not incapable of holding a Benefice by virtue thereof. And 3^{to} By an Act of the 7th Year of his present Majesty, intituled, *An Act to indemnify Persons who have omitted to qualify themselves for Employments or Offices, by taking the Oaths, &c.* All Persons who had on or before the Time therein limited taken the Oaths, are indemnified of and from every Penalty and Forfeiture, or Incapacity, incurred by their antecedent Neglect; so that there was not the least Colour for the Objection.

To conclude; the Trial of the Patron's Right, in a Question of this kind, before your Lordships, is uncommon; but then it must be admitted on the Part of the Charger, that the Procedure of the Church in this Case has been no less new and uncommon: The Presentee was settled by the Commission of the General Assembly, who were empowered finally to determine in all Questions concerning the Settlement of this Parish; this Settlement was reversed, without calling the Patron or the Presentee; and when the Patron, as considering this to be a new Vacancy, offered a new Presentation, to which no Exception could be taken, other than a Supposition not founded in Fact, That the Church had not been planted; yet the Presbytery was pleased to reject his Presentation: And when the Patron had mean'd himself to your Lordships, and had obtained a Sist of Procedure, they notwithstanding thought fit to go on, in Contempt of your Lordships Authority; and two of their Number compeared at your Bar, and insisted, that you had no Jurisdiction in the Matter. This brought Mr. *Moncrief* under the unpleasant Necessity of vindicating his Right in the manner appointed by Law, and in which he hopes for Success, if the Right of Presentation restored to Patrons by the Act *decimo Annæ* is indeed a civil Right, and which can be made effectual by a Civil Court.

ROB. CRAIGIE.